No. 7426

In The
United States Circuit Court of Appeals
For the Ninth Circuit.

O. KRAFT, Appellant, vs. NATIONAL SURETY COMPANY, a corporation, H. P. SULLIVAN, E. H. BOYER and A. F. STOWE, Appelles.	No. 7426

BRIEF FOR APPELLANT

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

For convenience we shall refer to the parties as designated in the trial court.

Plaintiff brought an action for malicious prosecution against a U. S. Commissioner and ex-officio Justice of the Peace, a deputy U. S. Marshal, the

U. S. Marshal of the Division and his bondsmen (Tr. p. 1), charging also a breach of the official bond of the U. S. Marshal. (Tr. p. 5). After various motions and demurrers were disposed of Defendants answered separately (Tr. pp. 13-21-29). The marshal disclaimed knowledge of the prosecution at its inception, all defendants alleging the prosecution was brought because an inspection of plaintiff's records were desired to secure evidence of a violation of the game law by an alien whose name is not disclosed. Dismissal of the suit was admitted and all material allegations of the amended complaint denied. Plaintiff demurred (Tr. pp. 36-37) as answers did not constitute a defense. Demurrers were overruled (Tr. p. 38) and the case, having been transferred to the Valdez docket upon motion of defendants (Tr. p. 58), was called for trial at Valdez. Defendants moved for judgment on the pleadings on that day (Tr. p. 45) and on the same day and before the hearing on the said motion plaintiff filed replies to the answers (Tr. pp. 38-41-43). The Court granted the defendants' motion and gave judgment for costs and attorney's fee (Tr. p. 46). From which order and judgment and the overruling of his demurrers the plaintiff appeals.

SPECIFICATIONS OF ERROR.

On this appeal the appellant relies upon and intends to urge errors which he asserts were made by the District Court.

1. The court erred in overruling the demurrer of plaintiff to the separate answers of the defendants for the reason that the said answers do not state facts sufficient to constitute a defense to the cause of action and do not comply with the requirements of Section 895, Compiled Laws of Alaska.

2. The court erred in granting defendants' motion for judgment on the pleadings.

3. The court erred in entering judgment on the pleadings because the case was at issue and should have been submitted to a jury. (Tr. p. 49.)

ARGUMENT.

The court erred in overruling the demurrer of plaintiff to the answers of defendants.

Sec. 895, Compiled Laws of Alaska, reads in part:

> "The answer of the defendant shall contain —First. A general or specific denial . . . Second. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

Defendant H. P. Sullivan, U. S. Marshal (Tr. p.

26), sought to avoid liability by disclaiming knowledge of the justice court case at its inception. It is submitted that this does not constitute new matter within the purview of the section above quoted and is wholly immaterial as a defense, in this:

> "The averment of a conspiracy does not in any way change the nature of the action," 38 C.J. 463, Sec. 125.

The gist of the action is not the conspiracy. See Note 29 of above citation.

The U. S. Marshal was responsible under his bond whether he conspired or not. Whether or not he was a joint tort feasor he was responsible for the acts of his deputy, acting under color and by virtue of his office. (Fidelity & Deposit Co. of Maryland vs. Bordsley, 22 Fed. 603). Would plaintiff have submitted to arrest otherwise? Plaintiff alleges he was a conspirator, he denies the charge, but whether it was alleged or capable of proof is immaterial. It does not go to the merits of the action, but is merely an aggravation of the offense if proved. He was sued for a breach of his bond as under the Laws of Alaska he is held responsible on his official bond for the acts of his deputy.

Sec. 369, Compiled Laws of Alaska, says, inter alia, "Each marshal . . . shall be responsible on his

official bond for the acts of all deputy marshals appointed by him."

> "The rule that the superior officer is liable for acts of his deputy done under color of his office is too well settled to need discussion." Holden vs. Williams (U. S. Marshal), Alaska, April 29, 1896, 75 Fed. 798.
>
> Murfee on Official Bonds, Sec. 211.
> Lee vs. Charmley, 129 N.W. 448, 33 LRA NS 275.

Regulation 21 of The Alaska Game Law, reads:

> "Each licensed fur farmer or fur dealer shall comply with the provisions of all Territorial laws relating to fur farmers and fur dealers, and, at all reasonable hours, shall allow any member of the commission, any game warden, or any authorized employee of the United States Department of Agriculture to enter and inspect the premises where operations are being carried on under these regulations, and to inspect the books and records relating thereto."

What is the defense defendants Boyer and Stowe offered? Two petty officials, who had the freedom of the mails and the Naval Radio and could have had advice from the District Attorney within a few hours (they admit they postponed the case time after time until finally the District Attorney was advised of it and ordered it dismissed), claiming they were acting in the belief it was their duty to

enforce the game laws by arresting a gentleman of forty years residence in the commuunity, one of the biggest merchants and property owners, a shareholder in canneries in the vicinity, a man with children and grandchildren. He would not run away. There was no need for precipitous action. Boyer alleges (Tr. p. 30) he heard he was trafficing in illegal furs with an unnamed alien and apparently to coerce, intimidate and force him to furnish evidence against himself and the unknown they bring this charge against him. This is not a defense in reason and we submit not in law.

> "A void process procured through malice, and without probable cause, is even more reprehensible, if possible, than if it charged a criminal offense. The wrong is not in the charge alone but more in the object and purposes to be gained and the intention and motive in procuring the complaint and arrest." McIntosh vs. Wales (Wyo.) 134 Pac. 276, cited with approval in Peterson vs. Hoyt, 4 Alaska 715.

> "Ignorance of the law excuses no man, least of all an officer, for, having undertaken to perform the duties of his office, he must know and perform them at his peril." York vs. Clopton, et al, 32 Ga. 364.

Cited by the court in Jackson vs. Siglin, 10 Oregon 96.

The court erred in granting defendants' motion for judgment on the pleadings.

Malice and lack of probable cause were alleged in the amended complaint (Tr. p. 6), and controverted by the answers (Tr. pp. 19-27-33), and no new matter or counterclaim being averred in the answer it is submitted that the case was at issue without further pleading on the part of the plaintiff.

> "Defendant is not entitled to a judgment because of the failure to reply, where the case is sufficiently at issue without it, or the matter set up by the defendant is insufficient to require a reply, or where the admissions resulting from the failure to reply do not defeat plaintiff's cause of action." 49 C.J. 673, Watkinds vs. S. P. R. Co. 38 Fed. 711, 4 LRA 239.

> "Matters to which, if plaintiff should reply, he could do so only by reiterating the allegations of his complaint, is not new matter." 49 C.J. 326, Sec. 396, Note 30; Muskoge Vitrified Brick Co. vs. Napier, 126 Pac. 792; Pott vs. Hanson, 109 Minn. 416, 124 N.W. 17.
> "A reply cannot be required, and is never necessary, to allegations which are in form new matter but in substance amount merely to denials" 49 C.J. 327, Sec. 397, Note 35. Watkinds case cited above.

The court erred in entering judgment on the pleadings.

"The granting of a judgment upon the pleadings on motion is not regarded with favor by the courts." Betsch et al vs. Umphrey et all, 252 Fed. 573.

"A motion for judgment on the pleadings is not in harmony with the spirit of code procedure and is not favored." Currie vs. S. P. Co., 23 Oregon 400, 31 Pac. 963.

"It is well settled that, where a material issue is tendered by the pleadings, judgment on the pleadings is improper." Lovelock Land vs. Lovelock Land & Development Co., 7 Pac. (2nd) 593-595.

Childers vs. N. Y. L. Ins. Co., 117 Okla. 7, 245 Pac. 59, cited in Smith vs. Hughes, 135 Okla. 296, 275 Pac. 628, 65 ALR 573-581.

Respectfully submitted,

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